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Planting the Seed for Change: Protecting Washington's Most Vulnerable Workers

Alonso Cano

*The migrants have no lobby. Only an enlightened, aroused, and perhaps angered public opinion can do anything about the migrants. The people you have seen have the strength to harvest your fruit and vegetables. They do not have the strength to influence legislation. Maybe we do. Good night, and good luck.*¹

I. INTRODUCTION

The strife between farmworkers in Washington State and their employers has existed since before Washington became a state in 1889.² At that time, the struggle was between the white settlers, and the Native American and the Chinese laborers.³ At the heart of the conflict farmworkers and their advocates are fighting for suitable working conditions and an opportunity to receive fair compensation for their hard work in the fields. Although the composition of the farm labor force in Washington is now predominantly Latino, the conflict remains the same.⁴ Despite some positive impact, laws such as the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) and the Farm Labor Contractor Act (FLCA) continue to leave several key farmworkers' rights unprotected. As representatives of all people living and working in the state, Washington lawmakers need to take

¹ Edward R. Murrow (1908-1965) was a Peabody Award winning journalist and pioneer of television news broadcasting. *CBS Reports: Harvest of Shame* (CBS television broadcast Nov. 25, 1960) [hereinafter *Harvest of Shame*].

² James N. Gregory, *Toward a History of Farm Workers in Washington State*, FARMWORKERS IN WASH. STATE HIST. PROJECT, http://depts.washington.edu/civilr/farmwk_ch1.htm (last visited Mar. 22, 2016).

³ *Id.*

⁴ *Id.*

action to remedy the injustices endured by the state's farmworkers as a result of inadequate laws.

Nationally, the agricultural industry is crucial to all Americans because a steady food supply is necessary for providing a steady food supply to everyone in the nation. In 2013, the United States Department of Agriculture (USDA) estimated that the American agricultural industry is responsible for 81 percent of domestic food consumption.⁵ This industry also contributes \$166.9 billion to the nation's Gross Domestic Product (GDP).⁶ Without these contributions from the American agricultural industry, the United States would have to find a way to fill in the gaps in domestic food consumption and lose a significant portion of the nation's economic output.

With such a high demand for agricultural production, farming operations have grown tremendously in the United States. Farming has increasingly changed from small-scale, individually operated farms, to massive operations utilizing modern high-tech equipment.⁷ Despite improvements in technology, inexpensive labor is in high demand because most harvesting is still done by hand.⁸ Hired farmworkers account for 60 percent of the workforce on American farms, and they continue to play an indispensable role in the nation's expanding agricultural industry.⁹

⁵ See *Import Share of Consumption*, USDA ECON. RES. SERV. (last updated Apr. 8, 2016), <http://www.ers.usda.gov/topics/international-markets-trade/us-agricultural-trade/import-share-of-consumption.aspx>.

⁶ *What is Agriculture's Share of the Overall U.S. Economy?*, USDA ECON. RES. SERV. (last updated Feb. 17, 2016), <http://www.ers.usda.gov/data-products/chart-gallery/detail.aspx?chartId=40037>.

⁷ Megan Horn & Nicholas Marritz, *Unfinished Harvest: The Agricultural Worker Protection Act at 30*, FARMWORKER JUST. 4 (2013), <https://www.farmworkerjustice.org/sites/default/files/FarmworkerJusticeUnfinishedHarvest.pdf>.

⁸ *Id.*

⁹ Philip Martin & J. Edward Taylor, *Ripe with Change: Evolving Farm Labor Markets in the United States, Mexico, and Central America*, MIGRATION POL'Y INST. 3 (Feb. 2013), <http://www.migrationpolicy.org/research/ripe-change-evolving-farm-labor-markets-united-states-mexico-and-central-america>.

There are approximately two million hired farmworkers in America.¹⁰ This includes both native-born and immigrant workers.¹¹ Of these hired farmworkers, 80 percent are Latino and 70 percent are immigrants, most of whom come from Mexico.¹² Additionally, the majority of farmworkers are male (approximately 75 percent), but there are still many women and adolescents working in the fields.¹³

The prevalence of immigrant labor is no accident. For centuries, the United States has relied on inexpensive immigrant labor to maintain the furious pace of expansion that has made the United States the world power it is today.¹⁴ Immigrants from Mexico and Asia provided inexpensive labor to the various industries in the United States, such as railroad construction and agriculture.¹⁵ Presently, immigrants from Latin American countries make up a large portion of the low-skill labor in the United States.¹⁶ Unfortunately, the same characteristics that make Latino immigrants ideal for filling the labor needs in the United States also make this group vulnerable and at risk for exploitation.¹⁷

Many farmworkers speak little English, are undocumented, and are not well educated.¹⁸ These barriers can significantly affect their ability to simply navigate daily life in another country, let alone fight for their rights as laborers. Without the ability to communicate effectively, farmworkers

¹⁰ Horn & Marritz, *supra* note 7.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Immigration, Railroads, and the West*, HARV. U. LIBR. OPEN COLLECTIONS PROGRAM, <http://ocp.hul.harvard.edu/immigration/railroads.html#pubs> (last visited Nov. 19, 2015).

¹⁵ Mark J. Russo, *The Tension Between the Need and Exploitation of Migrant Workers: Using MSAWPA's Legislative Intent to Find a Balanced Remedy*, 7 MICH. J. RACE & L. 195, 201 (2001).

¹⁶ *Farm Labor*, USDA ECON. RES. SERV. (Oct. 20, 2015), <http://www.ers.usda.gov/topics/farm-economy/farm-labor/background.aspx#countryoforigin>.

¹⁷ Russo, *supra* note 15.

¹⁸ Horn & Marritz, *supra* note 7.

might not be able to understand important information given to them by farm labor contractors (FLCs) and agricultural employers. Also, the low level of education of many farmworkers can further exacerbate the farmworkers' inability to communicate. Additionally, undocumented farmworkers might be reluctant to cause disruptions in their employer's farming operation by striking or seeking legal help (out of fear of retaliation or concerns about being deported).¹⁹ Language barriers, undocumented immigrant status, and low levels of education are not the only reasons why farmworkers are some of the most vulnerable workers, but these reasons are some of the most prevalent.²⁰

Lawmakers throughout the nation have the ability to solve the issues that plague these highly vulnerable workers. Change at the federal level is the most desirable option because it would protect more farmworkers, but there may be obstacles that make state-level change more likely to happen. Therefore, Washington legislators should pass a new comprehensive law that would have the same beneficial impact as a federal law would for the farmworkers in Washington.

In the following sections, I will begin with a brief discussion of the history behind the various federal laws affecting farmworkers today, as well as the laws in Washington State. This includes exploring the relevant portions of the statutes and discussing how these laws fall short of the goal of protecting farmworkers. Next, I will explain why it is more pragmatic, and therefore preferable, for Washington to take action at the state level rather than wait for Congress to address farmworker issues at the federal level. Finally, I will introduce my proposed legislation and elaborate on the specific provisions aimed at better protecting farmworkers in Washington.

¹⁹ Esther Yu-Hsi Lee, *Labor Unions Move to Protect Immigrants, Regardless of Legal Status*, THINK PROGRESS (Mar. 26, 2015, 8:00 AM), <http://thinkprogress.org/immigration/2015/03/26/3638255/unions-increasingly-bargaining-protect-undocumented-immigrants/>.

²⁰ *Id.*

II. BACKGROUND OF FARMWORKER STATUTES AND THEIR DEFICIENCIES

The groundbreaking 1960 documentary, “Harvest of Shame,” brought to light the terrible conditions millions of migrant farmworkers endured.²¹ The exposé shocked millions of Americans who were learning about the severity of the problem for the first time.²² This documentary stirred many Americans into urging politicians in Washington, D.C. to act to resolve these issues.²³ In 1963, Congress passed the Farm Labor Contractor Registration Act (FLCRA) with the aim “to curb the abuses of Farm Labor Contractors (FLCs) who were exploiting the vulnerabilities of illegal immigrants working as migrant workers.”²⁴ While the well-intentioned law imposed certain requirements on individuals engaging in contracting activities, its many flaws made it difficult to achieve its purpose of alleviating many of the injustices exposed in “Harvest of Shame.”

The FLCRA originally focused only on contractor activity, but not agricultural employer activity, until it was amended in 1974 to include “anyone who benefited from migrant workers.”²⁵ In 2012, an estimated one-third of hired farmworkers went through a contractor, so the FLCRA was limited in which workers it actually covered.²⁶ Critics of the FLCRA share this sentiment—as one critic states, “Exclusion of agricultural employers

²¹ See *Harvest of Shame*, *supra* note 1.

²² Elizabeth Blair, *In Confronting Poverty, ‘Harvest of Shame’ Reaped Praise and Criticism*, NPR (May 31, 2014, 5:22 AM), <http://www.npr.org/2014/05/31/317364146/in-confronting-poverty-harvest-of-shame-reaped-praise-and-criticism>.

²³ *Id.*

²⁴ Russo, *supra* note 15, at 202.

²⁵ *Id.* at 203.

²⁶ *Selected Statistics on Farmworkers*, FARMWORKER JUST. 2 (2004), <https://www.farmworkerjustice.org/sites/default/files/NAWS%20data%20factsht%201-13-15FINAL.pdf>.

from FLCRA's jurisdiction was a major shortcoming."²⁷ In 1982, a House of Representatives committee admitted that "testimony before Congress has shown that the Act of 1963 has failed to achieve its original objectives."²⁸ Recognizing that the FLCRA failed to accomplish its purpose after almost 10 years, Congress passed the AWP in 1983.²⁹ Likewise, Washington lawmakers realize that current laws are not adequately protecting certain farmworker rights and new legislation is needed.

A. Washington Farmworkers

Washington is "one of the most productive growing regions in the world."³⁰ The Washington Department of Agriculture proudly claims the title of the leading producer of apples in the country, and recently, Washington's agricultural production has surpassed 10 billion dollars.³¹ This remarkable success is in large part due to the hard work of the estimated 160,000 farmworkers in the state.³² Over the past three decades the estimated number of migrant and seasonal farmworkers in Washington has fluctuated between approximately 190,000 to over 400,000.³³ These farmworkers work on tens of thousands of farms in the state and help make agriculture a cornerstone of Washington's economy.³⁴

In Washington, and across the nation, farmworkers face a plethora of issues including immigration struggles, healthcare concerns, lack of

²⁷ Daniel B. Conklin, *Assuring Farmworkers Receive Their Promised Protections: Examining the Scope of AWP's "Working Arrangement,"* 19-SPG KAN. J.L. & PUB. POL'Y 528, 534 (2010).

²⁸ H.R. REP. NO. 97-885, at 2 (1982) reprinted in 1982 U.S.C.A.N. 4547, 4548.

²⁹ Conklin, *supra* note 27.

³⁰ *Agriculture: A Cornerstone of Washington's Economy*, WASH. STATE DEP'T. OF AGRIC. (May 14, 2015), <http://agr.wa.gov/aginwa/>.

³¹ *Id.*

³² *Id.*

³³ *Migrant and Seasonal Farmworker Demographics*, NAT'L CTR. FOR FARMWORKER HEALTH 4 (2009), <http://www.unctv.org/content/sites/default/files/0000011508-fs-Migrant%20Demographics.pdf>.

³⁴ See *Agriculture: A Cornerstone of Washington's Economy*, *supra* note 30.

education, unemployment, poverty, difficulty in finding quality housing, language barriers, and legal issues.³⁵ All of these issues deserve attention by those in a position to do something about it. However, for the purpose of this article, I will focus on issues affecting farmworkers that should be covered by the AWP and other federal and state laws.

1. Wages

In Washington, agricultural employers are required to pay any employee over the age of 16 the minimum wage of \$9.47, regardless of whether the employee is paid on a piece-rate or salary basis.³⁶ For workers under the age of 16, employers are required to pay at least 85 percent of the minimum wage.³⁷ Although minimum wage is required for all hours worked, agricultural workers in Washington are not entitled to overtime pay.³⁸

Along with the lack of overtime pay, Washington farmworkers are commonly paid on a piece-rate basis, which means that workers are paid based on productivity only.³⁹ This method of calculating wages benefits employers because it ensures that employees only get paid if they are producing the amount employers need them to.⁴⁰ This wage system can be hard on certain farmworkers that might not be able to produce at the amount required to reach even the minimum hourly wage.⁴¹ If a worker is paid by the bucket or area of land they pick, and they are unable to maintain a fast

³⁵ *Farmworker Health Factsheet*, NAT'L CTR. FOR FARMWORKER HEALTH (Aug. 2012), http://www.ncfh.org/uploads/3/8/6/8/38685499/fs-facts_about_farmworkers.pdf.

³⁶ *Wages for agricultural jobs*, WASH. STATE DEP'T. OF LAB. AND INDUSTRIES, <http://www.lni.wa.gov/WorkplaceRights/Agriculture/Wages/> (last visited Nov. 15, 2015).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Demetrio v. Sakuma Bros. Farms, Inc.*, 355 P.3d 258, 260-261 (Wash. 2015).

⁴⁰ Fritz M. Roka, *Compensating Farm Workers through Piece Rates: Implications on Harvest Costs and Worker Earnings*, THE INST. OF FOOD AND AGRIC. SCI. (Feb. 2009), <https://edis.ifas.ufl.edu/fe792>.

⁴¹ *Low Wages*, NAT'L FARM WORKER MINISTRY, <http://nfwf.org/education-center/farm-worker-issues/low-wages/> (last visited Mar. 25, 2016, 3:46 PM).

enough pace, they could find themselves making considerably less than their faster coworkers.⁴²

A recent high-profile case, *Demetrio v. Sakuma Bros. Farms, Inc.*, illustrates the issues with this wage system along with other alarming exploitations of farmworkers in Washington.⁴³ At the heart of the matter are claims of unfair wages, wage theft, mistreatment, and sexual harassment.⁴⁴ In *Demetrio*,⁴⁵ the Washington State Supreme Court held that farmworkers paid on a piece-rate basis are entitled to paid breaks under the Washington Minimum Wage Act.⁴⁶ Furthermore, the court held that the pay received during breaks must be equal to either the rate of regular pay or the state minimum wage, whichever is greater.⁴⁷ This ruling remains a significant victory over employers who seek to maximize profits at the expense of the health and safety of their employees.

Washington State Attorney General Bob Ferguson commented on the ruling stating, “Paid breaks for workers are a basic principle embodied in state law, and this decision ensures that some agricultural workers, who often perform difficult work for low pay, aren’t denied this right arbitrarily, based solely on their compensation method.”⁴⁸ As a result of this case, farmworkers from Bellingham, Washington, to Baja, California, have taken part in boycotts and demonstrations against agricultural employers.⁴⁹ While

⁴² *Id.*

⁴³ *Demetrio*, 355 P.3d at 261.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 266; WASH. REV. CODE § 49.46.020 (1988).

⁴⁷ *Demetrio*, 355 P.3d at 258.

⁴⁸ AG Ferguson’s Statement on Supreme Court Agricultural Worker Case, WASH. STATE: OFFICE OF THE ATT’Y GEN. (July 16, 2015), <http://www.atg.wa.gov/news/news-releases/ag-ferguson-s-statement-supreme-court-agricultural-worker-case>.

⁴⁹ *The Costco Connection: Farmworkers Bring Driscoll’s Boycott to Respected Washington Grocer*, KÁRÁNI: ESCRIBIR O VOLAR (Jun. 28, 2015), <https://karani.wordpress.com/2015/06/28/the-costco-connection-farmworkers-bring-driscolls-boycott-to-respected-washington-grocer/>.

this ruling is helpful, its helpfulness to Washington farmworkers is limited because it does not address the lack of overtime pay or unfair wage systems.

A recent Washington case involved farmworkers going a significant amount of time without receiving pay.⁵⁰ Dozens of former employees filed a class-action lawsuit against Golden Eagle Farms after workers were allegedly not paid for a month of work.⁵¹ The workers claim that the owner of the farm utilized the services of an unlicensed contractor who failed to pay the workers for the work they did in the month of September 2014.⁵² This blatant misconduct is an example of how contractors and employers have taken advantage of farmworkers in Washington.

2. Unionization

Washington State does not explicitly protect farmworkers right to unionize. Despite this, the United Farm Workers union (UFW) came to Washington two years after the strike against grape growers in Delano, California, in 1965.⁵³ Although Washington farmworkers had organized in the past, the UFW's arrival sparked the beginning of Washington's modern farmworker movement, and the movement has continued ever since, with recent boycotts of the Sakuma Brothers Farms.⁵⁴

Sakuma Brothers Farms is a major grower of berries in Washington, and their berries are used by some of the world's most popular brands like Haagen-Dazs and Yoplait.⁵⁵ Some workers employed by Sakuma argued

⁵⁰ Esther Yu-Hsi Lee, *Migrant Workers Allegedly Weren't Paid For a Month of Work on Blueberry Farm*, THINK PROGRESS (June 23, 2015, 12:51 PM), <http://thinkprogress.org/immigration/2015/06/23/3672830/blueberry-farm-wa-state-worker-wages/>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Farmworkers in Washington State History Project*, SEATTLE C.R. AND HIST. PROJECT, http://depts.washington.edu/civilr/farmwk_intro.htm (last visited Oct. 2, 2015).

⁵⁴ *The Costco Connection*, *supra* note 49.

⁵⁵ Liz Jones, *Washington Berry Pickers Push for Elusive Union Contract*, NPR (Jun. 17, 2015, 5:55 PM), <http://www.npr.org/sections/thesalt/2015/06/17/414986134/washington-berry-pickers-push-for-elusive-union-contract>.

that what is needed to solve the problems with their employment is a union contract.⁵⁶ However, Sakuma Brothers Farms CEO Danny Weeden seems uninterested in furthering the discussion of a union contract with the workers at the farm.⁵⁷ While it is not certain that the management of Sakuma Brothers Farms would retaliate against its workers if the workers decide to organize, laws in Washington do not explicitly protect these farmworkers if they choose to join or form unions. Unionization has the potential for increasing the bargaining power of the labor force, but without protection under the law, this tactic might not be as enticing for aggrieved farmworkers.

B. Federal and State Laws

Next, I will focus on three laws: the Migrant and Seasonal Agricultural Worker Protection Act and the Fair Labor Standards Act (FLSA)—both federal laws—and the Farm Labor Contractor Act (FLCA)—a Washington law.⁵⁸ These laws are pertinent to the discussion of my proposed solution because the weaknesses in these laws are the basis for my recommendations.

1. The Migrant and Seasonal Agricultural Worker Protection Act

The purpose of the AWPA is “to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this chapter; and to assure agricultural associations, and agricultural employers.”⁵⁹ In order to determine the best way to proceed in improving or replacing the AWPA, it is necessary to break down the statute, acknowledge its strengths, and identify its weaknesses.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 29 U.S.C. § 1801-1872 (1983); 29 U.S.C. § 201-219 (1938); WASH. REV. CODE § 19.30 (1985).

⁵⁹ 29 U.S.C. § 1801.

At the foundation of the AWP is the idea of “joint employment,” which means that workers can hold farm owners jointly liable with farm labor contractors (FLCs) for AWP violations.⁶⁰ Laborers tend to hold little power in their employment relationship with farm owners and FLCs.⁶¹ Farm owners initiate employment decisions not only because they decide whether to use a FLC, but also because they get to decide which FLC to use.⁶² This choice comes with serious implications because choosing the wrong FLC could mean the farmworker has to deal with a contractor that has little interest in complying with the law, instead of one who is fair and operates lawfully. Some describe this dynamic as “. . . *the indivisible hinge* between certain important duties imposed for the protection of migrant and seasonal workers and those liable for any breach of those duties.”⁶³

a) Applicability of the AWP

Under the AWP, not all farmworkers are protected and not all employers are required to comply with its mandates.⁶⁴ The AWP protects only two kinds of farmworkers: migrant workers and seasonal workers.⁶⁵ According to the AWP, a “‘migrant agricultural worker’ means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.”⁶⁶ A “‘seasonal agricultural worker’ means an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence.”⁶⁷

⁶⁰ Horn & Marritz, *supra* note 7, at 11.

⁶¹ *See id.*

⁶² *Id.* at 6.

⁶³ *Id.*

⁶⁴ 29 U.S.C. §§ 1802-1803 (1983).

⁶⁵ § 1802.

⁶⁶ § 1802(8)(A).

⁶⁷ § 1802(10)(A).

Undisputedly, migrant workers and seasonal workers deserve to be protected by the law—but so do all farmworkers. By limiting its coverage to seasonal and migrant workers, the AWPAs denies its protections to a segment of the hired farmworker population that does not fall within its definition of either a migrant or seasonal worker.⁶⁸ Individuals such as full-time farmworkers may find themselves working alongside others with more legal remedies than them, even though they do the exact same work.

Additionally, although farmworkers in the United States under an H-2A visa enjoy the status of being legally authorized to work in the United States, the AWPAs's various provisions do not protect migrant farmworkers under this type of permit.⁶⁹ The H-2A program is designed for US employers and agents to offer temporary or seasonal employment to foreign nationals.⁷⁰ An average of 80,000 US migrant workers are working with an H-2A visa.⁷¹ The purpose of this program is to fill agricultural jobs when US employers are unable to find workers already residing in the United States to fill the temporary positions.⁷² A migrant farmworker with an H-2A visa may bring their spouse and children under age 21 under an H-4 visa but they may not be eligible to work in the United States under the H-4 visa.⁷³ This means that not only are H-2A farmworkers negatively affected by the exclusion from the AWPAs, their families who are not eligible to work are equally impacted.

⁶⁸ § 1802.

⁶⁹ § 1802(8)(B)(ii); *H-2A Temporary Agricultural Workers*, U.S. CITIZENSHIP AND IMMIGR. SERV., <http://www.uscis.gov/working-united-states/temporary-workers/h-2a-agricultural-workers/h-2a-temporary-agricultural-workers> (last updated Dec. 3, 2015).

⁷⁰ *H-2A Temporary Agricultural Workers*, *supra* note 69.

⁷¹ Etan Newman, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*, FARMWORKER JUST. 18, <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20fwj.pdf> (last visited Nov. 21, 2015).

⁷² *H-2A Temporary Agricultural Workers*, *supra* note 69.

⁷³ *Id.*

Not only are certain workers exempt from the AWPAs, but certain agricultural operations are also exempt from complying with the AWPAs—non-profits, small businesses, family businesses, etc.⁷⁴ However, by no means are employees of a non-profit organization less entitled to protections under the law than employees of large-scale, for-profit operations. Non-profit operations, along with small-scale operations and family businesses, are just as capable of exploiting hired farmworkers as large-scale farming operations so they should have to play by the same rules.

b) Requirement for Contractors to Register

When the AWPAs replaced the FLCRA, it did not eliminate the requirement that FLCs register and that they comply with the terms of their registration.⁷⁵ On the contrary, the registration requirement explicitly states that “no person shall engage in any farm labor contracting activity, unless such person has a certificate of registration.”⁷⁶ This certificate is not a broad license that gives authority to engage in all types of contracting activity; the certificate will specify which activities the FLC is “authorized to perform.”⁷⁷ Additionally, FLCs are required to both possess a certificate and exhibit their certificate, upon request, to any person they wish to hire or work for.⁷⁸

The United States Court of Appeals for the Sixth Circuit has ruled that not only are FLCs required to produce valid certificates, but employers that utilize the services of FLCs are also required to take “reasonable steps to determine that the farm labor contractor possesses a certificate of registration which is valid, and which authorizes the activity for which the

⁷⁴ 29 U.S.C. § 1803 (1983).

⁷⁵ *Id.*

⁷⁶ 29 U.S.C. § 1811(a) (1983).

⁷⁷ § 1811(a).

⁷⁸ § 1811(c).

contractor is utilized.”⁷⁹ Without this requirement, employers that use unregistered FLCs would have an avenue for avoiding liability when the FLCs violate the AWPAs because they could claim the FLCs failed in their duty to prove registration.

The registration requirement for contractors is an indispensable part for any law that aims to protect migrant farmworkers because contractors often play the role of the middleman between the employer and the laborer.⁸⁰ The process of receiving a certificate to operate as a FLC allows the government to exclude those who have little interest in the well-being and fair treatment of migrant farmworkers. Of course, registered FLCs are capable of exploiting migrant workers, and there is no guaranteed way to prevent violations by registered FLCs, but it is important that there is a system in place to track who is engaging in the contracting and who should not be authorized to engage because of past conduct.

c) Enforcement Provisions

The enforcement provisions are the most objectively deficient part of the AWPAs. Since 1983, when the AWPAs were passed, the value of the dollar has increased almost 150 percent.⁸¹ Over that same period, the productivity of the agricultural industry has grown considerably, while the costs associated with agriculture (capital, labor, land, energy, etc.) have decreased.⁸² The end result is an industry that is overall more efficient and, therefore, more profitable.⁸³ Despite the prosperity of the agricultural

⁷⁹ *Castillo v. Case Farms of Ohio, Inc.*, 96 F.Supp.2d 578, 597 (W.D. Tex. 1999).

⁸⁰ See Horn & Marritz, *supra* note 7, at 4-5.

⁸¹ See *CPI Inflation Calculator*, BUREAU OF LAB. STAT., http://www.bls.gov/data/inflation_calculator.htm (last visited Nov. 27, 2015).

⁸² Keith O. Fugile, James M. Macdonald, & Eldon Ball, *Productivity Growth in U.S. Agriculture*, USDA ECON.RES. SERV. 2-3 (Sept. 2007), http://www.ers.usda.gov/media/201254/eb9_1_.pdf.

⁸³ *Id.* at 3.

industry, today's employers and FLCs would be fined for the same exact amount under the AWPAs as violators in 1983.⁸⁴

According to the criminal sanctions section of the AWPAs, the first violation carries a fine of no more than \$1,000, one year in prison, or both.⁸⁵ Subsequent violations carry a fine of no more than \$10,000, three years in prison, or both.⁸⁶ If we assume that deterrence is a desired outcome of the AWPAs penalties, then by allowing violators to get away with paying a mere \$1,000 for exploiting vulnerable workers, we will probably not achieve the desired deterrent effect.

In addition to imposing criminal penalties, the AWPAs also imposes the possibility of judicial enforcement in the form of temporary or permanent injunctive relief.⁸⁷ In order for an injunction to happen, the Secretary of Labor must first petition a US district court.⁸⁸ The injunction is crucial for farmworkers because this remedy can potentially do more to influence the conduct of an employer or contractor than a fine would. Presumably, agricultural employers would like to avoid work stoppages that an injunction would create given that the nature of the business involves processing perishable food in a timely manner.

2. Fair Labor Standards Act

Upon signing the Fair Labor Standards Act of 1938, President Franklin D. Roosevelt proclaimed the FLSA was "the most far-reaching, far-sighted program for the benefit of workers ever adopted in this or any other country."⁸⁹ The law's impact on the average American worker was significant because its provisions eliminated "labor conditions detrimental

⁸⁴ 29 U.S.C. § 1851 (1983).

⁸⁵ § 1851.

⁸⁶ § 1851.

⁸⁷ 29 U.S.C. § 1852 (1983).

⁸⁸ § 1852.

⁸⁹ *Radio Address of the President: Franklin D. Roosevelt*, (White House Broadcast May 24, 1938).

to the maintenance of the minimum standards of living necessary for health, efficiency, and well-being of workers.”⁹⁰ Although the FLSA benefits most workers in the United States, it does hurt all farmworkers by exempting them completely from overtime entitlements and from the minimum wage entitlement in certain situations.⁹¹

First, agricultural workers are not entitled to overtime pay under the FLSA.⁹² This is unfortunately true for millions of farmworkers despite working in “. . . one of the three most dangerous occupations in the United States, as measured by occupational mortality rates.”⁹³ Thousands of farmworkers are injured on the job each year, and hundreds die in farming accidents.⁹⁴ Farmworkers are exposed to pesticides on a daily basis, they often work in extreme temperatures, they are routinely around dangerous machinery, and they typically work in rural areas far from emergency medical care.⁹⁵ The reasons the FLSA excludes agricultural workers from its coverage is not clear. Farmworkers are no less deserving of receiving overtime pay than workers in retail jobs or food service occupations. Yet, they will not receive overtime pay unless their state is one of the few that has recognized this unfair treatment under the FLSA and has extended the overtime requirement to farmworkers.⁹⁶

Second, if an employer of agricultural workers does not use more than 500 “man-days” of agricultural labor in any calendar quarter in the

⁹⁰ 29 U.S.C. § 202 (1938).

⁹¹ 29 U.S.C. § 213 (1938).

⁹² *Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA)*, US DEPT. OF LAB., (Jul. 2008), <https://www.dol.gov/whd/regs/compliance/whdfs12.htm>.

⁹³ Laura Lockard, *Toward Safer Fields: Using AWPAs Working Arrangement Provisions to Enforce Health and Safety Regulations Designed to Protect Farmworkers*, 28 N.Y.U. REV. L. & SOC. CHANGE 507, 509 (2004).

⁹⁴ *Farm Safety Fact Sheet*, OSHA, 1 (Sep., 2005), https://www.osha.gov/OshDoc/data_General_Facts/FarmFactS2.pdf.

⁹⁵ *Id.*

⁹⁶ Joseph Berger, *Long Days in the Fields, Without Earning Overtime*, N.Y. TIMES (Aug. 7, 2014), http://www.nytimes.com/2014/08/08/nyregion/in-harvest-season-endless-hours-with-no-overtime-for-new-york-farmworkers.html?_r=0.

preceding calendar year, then the employer not required to comply with both the minimum wage and overtime provisions.⁹⁷ To put this exemption into perspective, a farm owner that employs five full-time workers over the summer months would not have to pay them the minimum wage or pay them overtime. These hypothetical workers could be working as hard as any other farmworker, but due solely to the size of the farming operation, they could legally be paid considerably less than the minimum wage, and they would not be entitled to overtime pay of any kind because of the exemptions from the FLSA.⁹⁸

3. Washington's Farm Labor Contractor Act

The FLCA was passed in 1985 with the intent of regulating contractors' conduct and requiring them to obtain a license from the director of the Washington Department of Labor and Industries.⁹⁹ Its function is fundamentally similar to the contractor registration requirement found in the AWP. However, there are two key differences between the provisions in the AWP and the provisions in the FLCA that make the latter more effective—the requirement of a surety bond and harsher violation penalties.

First, the FLCA requires that before receiving a license, contractors must deposit a surety bond to “ . . . insure compliance with the provisions of this chapter.”¹⁰⁰ The surety bond may not be less than \$5,000, and the director has the discretion to require a higher amount.¹⁰¹ The surety bond is intended to act as a safeguard to ensure that FLCs are able to cover wages and other agreements with workers in the event that something arises and they are unable to cover them through the normal procedure.¹⁰² While the AWP

⁹⁷ 29 U.S.C. § 213(a)(6)(A) (1938).

⁹⁸ § 213(b)(12).

⁹⁹ See WASH. REV. CODE § 19.30.020 (1985).

¹⁰⁰ WASH. REV. CODE § 19.30.040(1) (1985).

¹⁰¹ § 19.30.040(1)-(2).

¹⁰² See *Farm Labor Contractor Application/Renewal Packet*, WASH. STATE DEP'T OF LAB. & INDUSTRIES 4 (Oct. 2014), <http://www.lni.wa.gov/forms/pdf/F700-170-000.pdf>.

requires insurance for vehicles used in the transport of migrant farmworkers, the AWPAs does not require similar insurance for FLCs or employers.¹⁰³

The second advantage that the FLCA has over the AWPAs is the higher amount in fines for violations. The FLCA imposes a fine of up to \$5,000 without distinguishing between first time and repeat violations.¹⁰⁴ Imposing such a fine on first-time offenders will have a much greater deterrence effect than the mere \$1,000 fine of the AWPAs. Undoubtedly, the FLCA is useful for establishing a database of registered FLCs in Washington, and it is more stringent than registration requirement found in the AWPAs. However, the FLCA is limited because it does not comprehensively protect farmworkers in other employment aspects such as overtime pay and the right to unionize. Building on the AWPAs's foundation and passing a comprehensive farmworker protection act in Washington can resolve these FLCA limitations.

III. BUILDING ON THE AWPAs'S FOUNDATION: A STATE-LEVEL SOLUTION

In the final subsection of the AWPAs, Congress included a provision which states that the AWPAs "is intended to supplement State law, and compliance with this chapter shall not excuse any person from compliance with appropriate State law and regulation."¹⁰⁵ A fair interpretation of this provision is that Congress intended the AWPAs to be a statute of minimum requirements, not a ceiling.¹⁰⁶ This provision also precludes violators of state laws and regulations from relying on the AWPAs in their defense.¹⁰⁷ As a state with a large population of farmworkers, Washington has the

¹⁰³ 29 U.S.C. § 1841(b)(1)(C) (1983).

¹⁰⁴ WASH. REV. CODE § 19.30.150 (1985).

¹⁰⁵ 29 U.S.C. § 1871 (1983).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

responsibility to adequately address this issue at the state level if Congress fails to do so at the federal level.

In order to solve many of the problems faced by Washington's farmworkers, I propose that Washington pass a new law that maintains the current protections available to farmworkers through the AWP and the FLCA, but also includes additional provisions to fill in the gaps left by the AWP and the FLSA. I will begin with a discussion of why it is better for Washington to take action now instead of waiting for Congress. I will then provide the various provisions that should be included in the proposed law: coverage for all farmworkers, overtime pay for agricultural workers, increased sanctions for violators, increased funding for enforcement, and protection for farmworkers who choose to organize and join labor unions.

A. Federal vs. State Considerations

It may seem illogical to propose state legislation instead of federal legislation in order to solve problems created by federal laws. However, the ultimate goal of protecting all farmworkers in the United States can start with tackling the problem in Washington first. Washington has already acted as a pioneer for different progressive movements, such as the legalization of recreational marijuana¹⁰⁸ and same-sex marriage,¹⁰⁹ so it can once again assume this role in the fight for farmworker rights.

1. The Federal Level Approach

The ideal solution for the issues farmworkers face in Washington would be the federal level because agriculture is inherently the type of industry where workers should not expect long-term employment or geographical

¹⁰⁸ Ethan Nadelmann, *Washington State and Colorado Will Lead the Way Toward Sensible Drug Laws*, HUFFINGTON POST (Nov. 7, 2012, 12:50 AM), http://www.huffingtonpost.com/ethan-nadelmann/washington-state-and-colo_b_2090286.html.

¹⁰⁹ *Same-Sex Marriage, State by State*, PEW RES. CTR. (June 26, 2105), <http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/>.

stability.¹¹⁰ Even though the need for labor on one farm ends for the season, the need for income for its laborers does not, so farmworkers must find a way to fill in the gaps in their income. Migrant farmworkers can find themselves not only working on different farms each year, but also in different states entirely.¹¹¹

Environmental changes can cause employment instability for farmworkers. For example, the recent drought in California has made it tremendously expensive to grow certain products.¹¹² This type of situation has created unfavorable economic conditions for the agricultural industry in California, which in turn moved much of the business to the South and the Midwest where water is much less expensive.¹¹³ If farmworkers on these negatively affected California farms decide to follow the work, they could potentially lose beneficial legal protections they enjoyed in California if their new state is one of the many that do not offer similar protections.

The issues occurring in California could also happen to farmworkers other states as well. Improvements at the federal level would improve the conditions for all farmworkers in the country, especially if they have to move to different states to find work. It is patently unjust for these workers to have to adjust their expectations regarding their legal rights simply because they could only find work in another state. Therefore, a law that can reach the most people at once and whose protections can follow farmworkers from state to state would be the most desirable solution. However, it may be difficult to pass such progressive legislation that

¹¹⁰ Horn & Marritz, *supra* note 7, at 4.

¹¹¹ *Id.*

¹¹² Alex Park & Julie Lurie, *It Takes How Much Water to Grow an Almond?!*, MOTHER JONES (Feb. 24, 2014, 5:55 AM), <http://www.motherjones.com/environment/2014/02/wheres-californias-water-going>.

¹¹³ *Id.*

imposes more regulation on the agricultural industry in a GOP-controlled Congress whose members often voice their anti-regulation opinions.¹¹⁴

2. Passing Amendments to AWPAs Through Congress Will be Difficult

There are three key reasons why change at the state level has a better chance of success than amendments to federal laws. First, anti-regulation sentiment is quite prevalent in Congress, and new labor laws, such as the one I propose here, are essentially expanding regulation on the agricultural industry.¹¹⁵ The exploitation of millions of farmworkers can be characterized as a serious human rights dilemma that can be remedied by passing new laws. However, opponents of these types of laws often claim that legislation imposing certain requirements on employers and extending protections to workers can be bad for the economy.¹¹⁶

For example, GOP politicians often argue that there is too much regulation on commerce and, in turn, unemployment is rising and small businesses are struggling.¹¹⁷ Without delving deeply into this argument, the average American might find it compelling. However, no economic benefit is enough to justify the exploitation of farmworkers because farmworkers are just as deserving of all the same protections under the law as other employees in the country. Still, this opposition to regulation would certainly be a major hurdle in any attempt to change the AWPAs at the federal level.

¹¹⁴ See Gerry Myers, *Republicans Control Both Houses of Congress; Democrats the Presidency: So What Does the Future Hold?*, THE HUFFINGTON POST (Jan. 20, 2015, 12:34 PM), http://www.huffingtonpost.com/gerry-myers/republicans-control-both-b_6501020.html; see also Russell Berman, *The Republican Solution to Red Tape*, THE ATLANTIC (Jun. 15, 2016), <http://www.theatlantic.com/politics/archive/2016/06/republicans-want-congress-to-have-a-say-in-regulations/487064/> (Legislation imposing regulations, such as requirements on agricultural businesses, would be unlikely to pass through a GOP-controlled Congress).

¹¹⁵ Berman, *supra* note 114.

¹¹⁶ See Eric Harris Bernstein, *The Faulty Logic of Jeb Bush's Anti-Regulation Argument*, ROOSEVELT INST. (Sep. 23, 2015), <http://rooseveltinstitute.org/faulty-logic-jeb-bushs-anti-regulation-argument/>.

¹¹⁷ See *id.*

Second, when farmworker issues come up in national politics, they are usually seen as part of the immigration reform discussion. With the majority of the hired farmworker population consisting of Latinos, it is not surprising that farm labor reform is commonly seen as a “Latino issue,” much like immigration reform.¹¹⁸ Of course, immigration is a pressing concern for many migrant farmworkers since 70 percent of hired farmworkers are immigrants.¹¹⁹ However, Congress has been unable to agree on an immigration reform plan, at least since President Obama has been in office.¹²⁰ Therefore, attaching farmworker issues with immigration issues leaves millions of people waiting for the change they desperately need.

Third, farm labor issues might only be a priority for states like Washington and California that have large farmworker populations.¹²¹ States with small agricultural industries, where not many hired farmworkers are employed, might not feel the same pressure to address farmworker rights issues. On the other hand, states like Washington and California, where agriculture is a significant part of the economy, might be more apt to deal with issues that can be detrimental for the state’s economy.

3. Washington is an Ideal Candidate for a Labor Reform Law

Washington’s tendency to vote Democrat in elections make it an ideal political climate for a labor reform law such as the one proposed in this article.¹²² In fact, the composition of the Washington State Legislature in

¹¹⁸ *National Agricultural Workers Survey*, U.S. DEP’T OF LAB. (Jan. 11, 2010), <https://www.doleta.gov/agworker/report/ch1.cfm>.

¹¹⁹ See Horn & Marritz, *supra* note 7.

¹²⁰ Fred Bauer, *The Real Congressional Immigration Showdown Will Happen in 2017*, NAT’L REV. (Oct. 22, 2015 4:00 AM), <http://www.nationalreview.com/article/425915/congress-immigration-reform-2017>.

¹²¹ *United States Farmworker Factsheet*, STUDENT ACTION WITH FARMWORKERS, <https://saf-unite.org/content/united-states-farmworker-factsheet> (last visited Feb. 8, 2016).

¹²² Peter Sullivan, *How Red or Blue is Your State?*, THE HILL (Oct. 24, 2014), <http://thehill.com/blogs/ballot-box/house-races/221721-how-red-or-blue-is-your-state>.

the past 12 years has been primarily Democrat.¹²³ As a result, Washington was one of the first states to pass laws such as the legalization of medical marijuana and the recognition of same-sex marriage; both of which were highly divisive and cut clearly between the two major parties, with Democrats leaning in favor of each new measure.¹²⁴ However, Washington's tendency to vote with the left in the past does not necessarily mean that law makers will vote to extend the labor rights of farmworkers.

However, certain Washington cities are pioneers in worker-centric legislation. Recently, the City of Seattle approved a measure that would, in time, increase the minimum wage to \$15 per hour, which will benefit thousands of Seattle workers.¹²⁵ While Seattle is not alone in approving such a measure, being one of the first cities to raise the minimum wage to such a rate demonstrates the desire of some of the state's lawmakers to protect workers. In addition, Washington is among the country's top ten states for labor union participation.¹²⁶ One of the contributing factors to a strong union presence is having favorable labor laws in the state along with the political climate of the state.¹²⁷ Washington's high union participation

¹²³ See *2015 State and Legislative Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES 1 (Feb. 4, 2015), http://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2015_Feb4_11am.pdf; *Partisan Composition of State Legislatures 2002-2014*, NAT'L CONF. OF STATE LEGISLATURES 1 (last visited Aug. 7, 2016), http://www.ncsl.org/documents/statevote/legiscontrol_2002-2014.pdf.

¹²⁴ See *Marijuana Legalization and Regulation*, DRUG POL'Y ALLIANCE, <http://www.drugpolicy.org/marijuana-legalization-and-regulation> (last visited Mar. 24, 2016); Mackenzie Weinger, *Wash. Gov. Signs Gay Marriage Law*, POLITICO (Feb. 13, 2012, 3:18 PM), <http://www.politico.com/story/2012/02/washington-state-oks-gay-marriage-072808>.

¹²⁵ MINIMUM WAGE ORDINANCE, <http://www.seattle.gov/laborstandards/ordinances/minimum-wage> (last visited June 22, 2016).

¹²⁶ Vince Calio et al., *5 States With the Absolute Toughest Unions*, TIME (May 30, 2014), <http://time.com/135975/unions/>.

¹²⁷ See *id.*

rate, along with the recent minimum wage laws, indicates that Washington is a good candidate for worker-friendly laws such the one I propose.

4. Washington Can Lead the Way to the Ideal Federal Solution

Passing a farm labor reform law in Washington would undoubtedly be a victory for Washington farmworkers. However, there would still be unresolved concerns for migrant farmworkers moving from state to state to find work. Washington can serve as a sort of laboratory for the rest of the country; as it currently is in the area of cannabis law where other states considering the legalization of marijuana can observe the effects of passing such laws.¹²⁸

Justice Brandeis best articulated this idea in *New State Ice Co. v. Liebmann* when he wrote, “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹²⁹ Washington could be one of these courageous states that attempts to comprehensively protect its most vulnerable workers by passing a law such as the one I propose. Depending on the effects that this new law has on the agricultural industry in Washington, other states might be inspired to do the same. In time, farmworkers that are compelled to relocate in order to find work will not have to adjust their expectations regarding their labor rights.

B. The Farmworker Protection Act

I propose that Washington pass the aptly named “Farmworker Protection Act” (FPA), which would comprehensively protect Washington farmworkers by imposing stringent requirements on contractors and

¹²⁸ *Marijuana Legalization in Washington State: One-Year Status Report*, DRUG POL’Y ALLIANCE (July 6, 2015), <http://www.drugpolicy.org/news/2015/07/marijuana-legalization-washington-state-one-year-status-report>.

¹²⁹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

employers and by protecting farmworker labor and unionization rights. The various components of the law would be inspired by the AWP, the FLCA, and other farmworker-oriented laws from different states. This proposed law brings together the necessary protections that farmworkers in Washington sorely need, along with harsher penalties.

The FPA would replace the FLCA in Washington but keep the requirements imposed on contractors, much like how the AWP replaced the FLCRA in 1983.¹³⁰ There is a parallel between what took place at the federal level in 1983 and what could happen in Washington if similar legislation were passed. At the federal level, Congress replaced a law aimed only at the conduct of contractors (FLCRA) with a law designed to be more protective by including employers (AWP).¹³¹ Similarly, because the FLCA in Washington focuses only on contractors, the Washington legislature should replace the FLCA with a more comprehensive law, like the FPA, that imposes more requirements on employers in order to extend more benefits to those working in agriculture.

1. Inclusion of All Farmworkers

The first major improvement from the AWP would be to make the FPA protect all farmworkers, regardless of the length of the employment or type of permit they are working under. Both non-seasonal workers and H-2A workers will benefit from this change. Under the FPA, year-round farmworkers would enjoy the same protections seasonal and migrant workers currently enjoy under the AWP, along with the new benefits from the additional provisions in the FPA. These protections and benefits would also apply to “nonimmigrant” aliens authorized to work on a temporary basis in the United States (H-2A workers) who were previously excluded by the AWP.

¹³⁰ Marc D. Stanley, *Rodents for Roommates: Liability Under the Migrant and Seasonal Agricultural Worker Protection Act*, 15 DRAKE J. AGRIC. L. 341, 346 (2010).

¹³¹ *Id.* at 346-48.

There is no compelling reason for excluding certain groups of workers from labor-protection laws. By passing the AWP in 1983, Congress identified that migrant and seasonal farmworkers were highly vulnerable to exploitation by their employers, and understandably, Congress chose to focus the AWP on these groups of workers.¹³² Undoubtedly, migrant and seasonal workers are vulnerable because many of them face language barriers or are undocumented, but other farmworkers not facing these particular obstacles are just as deserving of legal protections. This distinction may have been a way to level the playing field between workers born in the United States and those who come from other countries, but ultimately, farmworkers of all kinds are disadvantaged and hold little bargaining power in the employer and employee dynamic.

Furthermore, unlike the AWP, current laws in Washington, such as the FLCA, do not make the distinction between migrant and seasonal farmworkers, and other agricultural workers. The FPA should follow suit and eliminate this unnecessary distinction in the AWP by declaring that all hired farmworkers are protected the same under the law.

Relatedly, the FPA would not allow an exemption for employers that use small amounts of hired labor. Certainly, there must be some operations that are exempt for important reasons. For example, family-operated farms that do not hire workers would be exempted from the FPA but owners of small farms, even though they do not employ large numbers of hired farmworkers, would not be exempted. Hired workers in each type of farming operation deserve the same protections because it would be unfair to treat one worker different from another worker engaging in the same type of work simply because their employer operates a smaller operation.

¹³² H.R. REP. NO. 97-885, at 2 (1982).

2. Overtime Pay for Agricultural Workers

The FPA could resolve the issue of the FLSA exempting agricultural workers from overtime pay by requiring agricultural employers to pay their employees overtime. While the FLSA benefits farmworkers, it also excludes them in a significant way by exempting them from overtime pay.¹³³ Agricultural workers should not be treated any differently than other employees.

Farm work may be different from general retail work in that farmworkers typically work longer days and many more hours per week because of the nature of growing crops and dealing with perishable products.¹³⁴ Additionally, the piece-rate wage system essentially encourages workers to complete as much work as possible while the work is available because their pay depends entirely on their productivity.¹³⁵ With these considerations in mind, it is not surprising that employers would like to avoid paying their workers overtime pay that they would almost certainly have to pay. However, farmworkers should not have to work harder than others without fair compensation.

Several states have already made this change, so there are already examples for Washington to follow.¹³⁶ Perhaps Congress felt that the overtime pay decision should be left to the states to decide whether or not to include certain workers, but the action of these states indicates the growing sentiment that farmworkers should be included. The legislature should also consider how many hours farm workers should work before they are eligible for overtime pay. Currently, states that require employers to pay overtime to farmworkers vary in the details of their respective overtime

¹³³ 29 U.S.C. § 213(b)(12) (1938).

¹³⁴ Kay Embrey, *Coming Up on the Season: Migrant Farmworkers in the Northeast*, CORNELL MIGRANT PROGRAM 6 (last visited July 7, 2016), http://www.fachc.org/pdf/mig_Background%20for%20Teachers.pdf.

¹³⁵ *Low Wages*, *supra* note 41.

¹³⁶ Berger, *supra* note 96, (California, Hawaii, Maryland, Maine, Minnesota, and Oregon have all made the decision to require overtime pay for agricultural workers).

laws.¹³⁷ In California, farmworkers are entitled to overtime pay if they work more than 10 hours in a day or more than 60 hours in a week.¹³⁸ Recent efforts by California lawmakers to change the requirement to more than eight hours in a day and 40 hours per week failed.¹³⁹ In Hawaii, farmworkers are entitled to overtime pay if they work more than 40 hours in a week, but there is no requirement to pay overtime for working more than a certain number of hours in a day.¹⁴⁰ Similarly, in Maryland, farmworkers are entitled to overtime pay if they work more than 40 hours in a week.¹⁴¹

Washington should join states that impose a minimum of 40 hours worked per week before receiving overtime pay. California's overtime requirement is an improvement from the exclusion of the FLSA, but there were opponents to the 40-hour proposal, including Governor Arnold Schwarzenegger. The governor explained his reasoning for vetoing the overtime bill as follows: "while well-intended, will not improve the lives of California's agricultural workers and instead will result in additional burdens on California's businesses, increased unemployment and lower wages."¹⁴² Instead of focusing on this type of fear-inducing rhetoric, proponents of this change in Washington should look instead to states like Hawaii and Maryland as examples that have made the 40-hour requirement work.

¹³⁷ *Id.*

¹³⁸ CAL. CODE REGS. tit. 8, § 11140 (2001).

¹³⁹ John Meyers, *Assembly Kills Bill To Give California Farmworkers Overtime Pay*, LA TIMES (Jun. 30, 2015, 7:39 PM), <http://www.latimes.com/la-pol-sac-essential-politics-california-farm-workers-would-1464916409-htmstory.html>.

¹⁴⁰ HAW. REV. STAT. § 387-3 (2016).

¹⁴¹ MD. CODE, LAB. & EMPL. § 3-415 (2016).

¹⁴² *Schwarzenegger Vetoes Agricultural Worker Overtime Bill*, WOLTERS KLUWER, <http://www.employmentlawdaily.com/index.php/news/schwarzenegger-vetoes-agricultural-worker-overtime-bill/> (last visited July 7, 2016).

3. Harsher Penalties for Violations

I propose that the FPA not only structure its enforcement section like the AWPAs enforcement section, but also include harsher penalties than the AWPAs for willfully, or knowingly violating any of its provisions.¹⁴³ Of the two types of AWPAs penalties, only the monetary fines are plainly, and objectively, too lenient. Currently, the AWPAs imposes a fine of no more than \$1,000 for first offenses and no more than \$3,000 for subsequent offenses.¹⁴⁴ While this amount may have been a large sum of money in 1983, it is a rather small sum of money in 2015. Accordingly, the amount should be increased in the FPA to \$2,500 for first time offenders and \$7,500 for repeat offenders.

I propose these figures for two reasons. First, if the value of the dollar has increased approximately 150 percent since 1983, it follows that fines should be increased by the same percentage in order to have the desired punitive effects. Second, due to the increased productivity of the agricultural industry in the last few decades, profit margins have necessarily increased,¹⁴⁵ which means harsher penalties are required in order to have the desired deterrent effect. The relegation of these penalties as the mere “cost of doing business” is a major concern. There is no objective way to determine if FLCs and employers who routinely violate the AWPAs actually think this way. FLCs and employers would presumably not want to openly admit that they keep violating the law because it is cheaper to pay fines than comply with the AWPAs. Regardless of what FLCs and employers think, it is up to lawmakers to do what they can to set penalties that will deter potential violators. For the FPA to be effective, legislators cannot be afraid to punish those who violate the law and exploit vulnerable farmworkers.

The second type of penalty, prison time, remains a necessary option for the courts, but the lengths of these sentences do not necessarily need to be

¹⁴³ See generally 29 U.S.C. § 1851 (1983).

¹⁴⁴ *Id.*

¹⁴⁵ See Fugile, Macdonald & Ball, *supra* note 82.

extended for there to be meaningful impact in terms of punishment or deterrence. A prison sentence of up to three years is still as significant a punishment today as it was in 1983 when the AWP was passed. The act of willfully and knowingly exploiting vulnerable workers absolutely deserves heightened moral condemnation from society, but longer prison sentences may not be the most effective approach because the goal is to have responsible and fair employers, not more prisoners.

Instead of focusing on how long the prison sentences should be, the better approach would be to focus on the certainty of imprisonment. What may amplify the deterrence factor more than longer prison terms are mandatory prison sentences for repeat offenders of the FPA. Currently, the AWP enforcement provision makes a point to differentiate between the first-time offenders and repeat offenders by imposing larger fines and increased prison sentences.¹⁴⁶ In keeping with this idea, the FPA should include mandatory prison sentences of up to three years for subsequent violations in order to further discourage repeat offenders. Employers in Washington need to know that there are severe consequences for exploiting farmworkers. If the employers want to benefit from the rich soils, plentiful water, and temperate climate, they must abide by the rules that protect their employees.

4. Increased Funding for Better Enforcement

Through the FPA's provisions, the Washington legislature should allocate additional funding to Department of Labor and Industries, as well as other enforcement agencies, so the agency can better enforce the FPA. The additional funding would allow for increased hiring of personnel to focus on enforcing labor laws like the FPA. The additional personnel would include inspectors, investigators, and legal advocates. Having more government employees in the pertinent offices would allow for more frequent and comprehensive inspections, as well as an increased ability to

¹⁴⁶ 29 U.S.C. § 1851 (1983).

investigate claims of violations. In regards to legal help, legal aid organizations, such as the Northwest Justice Project, help thousands of Washington farmworkers with their civil legal needs, and increased funding would allow for the hiring of more attorneys and support staff.¹⁴⁷ While it would cost the government more money, there could be a potential for savings in having to adjudicate lawsuits due to a presumed effect the deterrence factor.

Furthermore, better enforcement can lead to a fairer commercial environment. It is unfair that employers who cut corners by ignoring the law and exploiting their workers are undercutting employers that comply with the law. In a fair economic environment, no participant can get ahead by breaking the law. Employers that take unfair advantage of their workers can reduce their labor costs and increase their profit margin, while employers that treat their employees well might not enjoy the same level of profitability because of their higher labor costs. Effective FPA enforcement would help level the playing field for law-abiding agricultural employers.

5. Protection of Workers' Rights to Organize

Finally, I propose that the FPA include protections for farmworkers that choose to organize and/or join labor unions. Naturally, the workers of a particular industry have first-hand knowledge of what they want. If they are unhappy with wages, working conditions, or anything related to their employment, they can align themselves with their fellow coworkers to make the change they want to see happen. Legislators should empower the thousands of agricultural workers in the state by passing a law that would allow farmworkers to unionize. This would ensure that, in the future, the solutions to issues that farmworkers face can come from bargaining between employers and employees rather than from the state capital.

¹⁴⁷ More information on the work of the Northwest justice Project can be found at <https://www.nwjustice.org>.

Washington should take its cue from California, which has already passed a law specifically addressing agricultural labor unions.¹⁴⁸ The modern farmworker labor movement began in California in the mid-1960s with the formation of the UFW.¹⁴⁹ Since then, the spirit of organization and unionization has been a part of the agricultural industry in California, and has moved across the state.¹⁵⁰ In response to some of these movements, the California legislature took action 45 years ago with the passage of the Agricultural Labor Relations Act (ALRA) in 1970.¹⁵¹

The ALRA proudly announces California's official position on the rights of their farmworkers to form unions in the statement, "It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing[.]"¹⁵² I propose that Washington adopt this policy and model their labor organization protections in the FPA after the protections in the ALRA.

The essential function of the ALRA is to extend coverage to those who do not fit in the National Labor Relations Act (NLRA) definition of an "agricultural employee."¹⁵³ According to the National Labor Relations Board, employees covered by the NLRA "are afforded certain rights to join together to improve their wages and working conditions, with or without a union."¹⁵⁴ These rights ensure that employers will not prohibit their employees from joining union organizations that represent employees

¹⁴⁸ CAL. LAB. CODE § 1140.2 (West 1975).

¹⁴⁹ *UFW History*, UNITED FARM WORKERS, http://www.ufw.org/_page.php?menu=research&inc=history/03.html (last visited Feb. 09, 2016).

¹⁵⁰ *See id.*

¹⁵¹ CAL. LAB. CODE § 1140.2 (West 1975). 8 C.C.R. § 1140-1166.3.

¹⁵² *Id.*

¹⁵³ Herman M. Levy, *The Agricultural Labor Relations Act of 1975-La Esperanza De California Para El Futuro*, 15 SANTA CLARA L. REV. 783, 786 (1975).

¹⁵⁴ *Employee Rights*, NAT'L LAB. REL. BOARD, <https://www.nlrb.gov/rights-we-protect/employee-rights> (last visited Feb. 9, 2016).

during labor disputes.¹⁵⁵ Securing these rights can help promote an environment where workers are no longer powerless individuals because their voice is amplified as part of a collective.

Decades after the ALRA was passed, it is still considered a key source of protection for farmworkers in California, even after it has gone through several amendments.¹⁵⁶ If Washington passed a similar law, the same workers can enjoy the same improvements to working conditions. Even though California beat Washington to the punch, perhaps the adoption of protecting union rights as part of the FPA will trigger a domino effect, and other states with large populations of farmworkers will follow California and Washington's lead.

Most importantly, enumerating unionization rights for farmworkers will serve as a prospective solution to issues that I have identified but not focused on, such as housing, healthcare, education, and immigration. The proposed FPA does not address these issues in a significant way, but they remain a pressing concern for thousands of Washington farmworkers and their families. By empowering unions made up of farmworkers to fight for their rights without the fear of reprisal, a wide array of future problems can be addressed without having to wait for the legislature to take action on their behalf. As an example, the piece-rate wage system, fraught with disadvantages for farmworkers, could be replaced through collective bargaining by a more equitable wage system that better ensures all workers are paid a fair wage. This new system could take any form, but the important point is that it would be made possible by farmworkers advocating for themselves. Perhaps César Chávez said it best when he claimed,

¹⁵⁵ *Id.*

¹⁵⁶ See John Skonberg & Michael Pedhirney, *California Implements Significant Changes to the Agricultural Labor Relations Act*, LITTLER (Feb. 15, 2012), <https://www.littler.com/california-implements-significant-changes-agricultural-labor-relations-act>.

The road to social justice for the farmworkers is the road of unionization. Our cause, our strike [against table grapes,] and our international boycott are all founded upon the deep conviction that the form of collective self-help which is unionization holds far more hope for the farm worker than any other single approach, whether public or private.¹⁵⁷

IV. CONCLUSION

Issues affecting farmworkers are not only important to the farmworkers themselves, but also to the country as a whole. How we treat the vulnerable amongst us is a direct reflection on the values that matter to the American people. Depriving farmworkers the appropriate protection under the law goes beyond a mere labor dispute and is a social justice dilemma that requires legislative involvement. This sentiment was crucial in the passing of the AWPB at the federal level and is one that should be shared by the Washington legislature. Congress can make changes at the federal level, and this may be the end result that is needed to protect Washington farmworkers; however, Washington should step up and pass its own laws that are more comprehensive and responsive to the issues specifically affecting Washington farmworkers.

Ultimately, even a perfectly drafted law that takes into account all of the needs of farmworkers will fail if it is not enforced adequately. The people who harvest our food share the same dreams and aspirations that Americans have for their families. Within Washington, thousands of vulnerable individuals go to the many farms to work long hours in difficult conditions. When these employees are exploited and their employers are allowed to continue to operate without repercussions, we fail to protect those who need protection the most. New legislation is long overdue; I am

¹⁵⁷ César Chávez, *Testimony before the Subcommittee of Labor of the Senate Committee on Labor and Public Welfare, April 16, 1969*, 3 (last visited July 8, 2016), <https://libraries.ucsd.edu/farmworkermovement/essays/essays/MillerArchive/031%20Statement%20Of%20Cesar%20E.%20Chavez.pdf>.

confident that someday soon Washington lawmakers will once again meet the challenge.